No. 2582

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

CANADIAN PACIFIC RAILWAY COMPANY (a corporation),

Plaintiff in Error,
(Defendant below),

vs.

JOHN WIELAND, doing business under the firm name and style of WIELAND BROS.,

Defendant in Error,
(Plaintiff below).

PETITION FOR A REHEARING.

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To the Honorable William B. Gilbert, Presiding Judge, and the Associate Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

Plaintiff in error presents this, its petition for a rehearing of the appeal in the above-entitled action, and respectfully urges the following contentions in favor of its petition:

Referring to the transcript of record, it will be seen that plaintiff in error was sued for the

value of a shipment of merchandise which was destroyed by fire (not due to any fault or negligence of plaintiff in error) while the same was in transit in bond for export through the Kingdom of Belgium, and which shipment was at the time of its destruction compulsorily in the physical uninterrupted, exclusive possession, control and custody of the Customs Authorities of the Kingdom of Belgium, pursuant to the provisions of an International Treaty.

All the parties concerned contemplated that the shipment involved should be a shipment in bond for export from Switzerland to America, pursuant to the provisions of the International Treaty.

Transcript, pp. 12 et seq.

Upon the arrival of the shipment in Belgium, the same, pursuant to the provisions of the treaty, was seized and taken into the custody of the Belgian Governmental Authorities to protect their lien for duties possibly payable until the shipment was exported out of Belgium.

The court in its opinion rendered herein declares that upon the arrival of the goods at Belgium the consignee had *three* courses available to him, one being that it could pay the duties upon the shipment and thereupon take the goods into its own possession. We think this statement of the court is an inadvertence or an error, because the agreement of the parties contemplated only a through shipment in bond for export. If the consignee had paid the Belgian duties, the payment would have represented a total loss to it. Such payment of duties and withdrawal of the goods

would have been contrary to the agreement and contemplation of the parties, and therefore plaintiff in error would not have been entitled to recover the amount of the duties from any one.

The statement of facts is clear on this point.

> "But it was his (Debenhams) duty *to receive and forward such shipments of merchandise as aforesaid only to the extent and in the sense and in the manner according to which shipments of merchandise coming into the Kingdom of Belgium in bond for export, pursuant and subject to the terms of the International Treaty hereinafter referred to, might be received by any one at Antwerp, to be thence forwarded under and pursuant and subject to the provisions of said Treaty.* The defendant, Canadian Pacific Railway Company, did not own the steamers upon which the shipments specified as aforesaid were embarked, but arranged with the owners of steamers for such space as was required from time to time to carry, to Montreal, such shipments as were ultimately intended to be carried towards their destination by defendant's railroad. *Such arrangements for ocean carriage of the shipments were contemplated by plaintiff and defendant in their dealings involved in this action.*"
>
> Transcript of Record, pp. 13 and 14.

It follows then that the parties contemplated that the goods (in bond for export) throughout their presence in Belgium, were to remain in the uninterrupted, exclusive official custody of the Government customs authorities of Belgium.

Transcript of Record, p. 19.

The goods were in such custody at the time when they were destroyed.

Transcript of Record, p. 21.

Upon this state of facts we contend that the case at bar is a novel one to which the general rules heretofore applied to control the liability of carriers in ordinary cases *are not applicable;* therefore the court should determine the controversy independently of the old inapplicable rules.

Reading the opinion on the decision of the appeal in this case, we beg leave to contend that the court concluded this point somewhat summarily, and that the point is one of weight and importance, which upon more considerate study would perhaps have been differently disposed of by the court.

The rule according to which extraordinary liability is charged upon common carriers is based upon the reason that such carriers are given exclusive possession, charge and control of goods, and therefore have great temptation and power to be dishonest.

> "The same reason holds to charge them in this case as to charge carriers, inn keepers and the like, *videlicet* the great inconvenience which would otherwise ensue, by reason of the dangerous temptation and opportunity they would be under to embezzle goods intrusted to them without possibility of proving a particular neglect."
>
> Lane v. Cotton, 12 Mod. 472 (482).

See also

> Coggs v. Bernard, 2 Ld. Raym., 909, 918; and Riley v. Home, 5 Bing. 217.

Now in the case at bar, the reason assigned for the liability of a carrier as an insurer does not exist. It can not be claimed that the carrier had any such active possession or control of the shipment as might afford temptation or opportunity to embezzle the goods, therefore it had no temptation or power to embezzle or miscarry the shipment.

Accordingly we contend that the general rules relative to carriers are not and can not be made applicable to this case.

The reason for applying the rule having ceased, the rule itself fails of application.

> "When the reason of the rule ceases, so should the rule itself."
>
> Civil Code of California, Section 3510;
> Katz v. Walkinshaw, 141 Cal. 116, 123.

> "It is contrary to the spirit of the common law itself to apply a rule founded on a particular reason to a case where that reason utterly fails."
>
> People v. Appraisers, 33 N. Y. 461;
> Beardsley v. Hartford, 50 Conn. 541, 542; 47 Am. Rep. 677.

Again, a carrier is not liable for goods taken from him and placed in the custody of the law, and the shipment here involved was in the custody of the law. The place in which the goods are kept is not of controlling importance, "but the custody of the government and the consequent ex-

clusion of control over them by the owner" is the essential fact.

Hartrenft v. Oliver, 125 U. S. 525, 527.

As soon as the shipment was introduced or entered into Belgium, duties became payable on it to the Belgium Government and continued to be payable until the shipment was exported pursuant to the Treaty.

U. S. v. Ehrgott, 182 Federal Rep. 272.

Therefore, upon the case stated, the shipment according to the express agreement of the parties, was compelled to remain in the custody of the Belgian Government, as security for the payment of its lien for taxes, until the shipment was actually sent out of its jurisdiction.

When the authorities of Belgium took the shipment at Sterpenich (the Belgian border), the taking was equivalent to a *seizure* of the same and it was thereby placed in custody of the Belgian Sovereignty, as security for the payment of the Government lien thereon, the summary proceedings which the customs officers were required to take against the goods being in the nature of proceedings *in rem* on the part of Belgium.

United States v. Cobb, 11 Federal Rep. 79,

and the Government warehouse was *an agency of the Government of Belgium,* and not like a free or private warehouse.

George v. Fourth National Bank of Louisville, 41 Federal Reporter, 263.

Our claim is that the shipment, having been duly seized by the proper Belgian Government officials, as security for the payment of the lien of their Government taxes, and the same having been duly deposited by them in the proper Government warehouse to secure such lien, was, at the time of its destruction, in custody of law.

> "Goods so deposited are at all times subject to the order of the owner, importer, or consignee, upon payment of the proper duties and expenses; but those are required to be secured by a bond to the satisfaction of the collector in double the amount of the duties. Duties upon such goods are required to be paid within a prescribed period; and in case the goods remained in public store beyond that time, without payment of the duties and charges thereon, they were to be appraised and sold by the collector at public auction, and the proceeds, after deducting the usual rate of storage at the port, with all other charges and expenses, including duties, were to be paid to the owner, importer or consignee. Whether the merchandise is deposited in the public stores, or in the other stores therein described, there is not one of the provisions here referred to which does not assume that the goods are in the possession and under the control of the collector; and whether deposited in a public or private warehouse, it is clear that the goods cannot be withdrawn for consumption without the payment of the duties; nor for transportation or exportation, except by paying the appropriate expenses".
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> Case No. 2831, 5 Federal Cases, p. 903.

> "From the moment of their arrival in port, the goods are, in legal contemplation, in the custody of the United States; and every proceeding which interferes with, or obstructs or

controls that custody, is a virtual violation of the provisions of the act".

Case No. 7424, 13 Federal Cases, p. 884;

Citing and applying

Harris v. Dennie (3 Peters), 28 U. S. 290, 304.

Again, defendant in error in its brief contends that the detention of the shipment in the warehouse was for the convenience of plaintiff in error, and the court appears to have accepted this contention as being well founded. But we think the record, fairly construed, makes no statement or inference from which such a conclusion is deducible. Mr. Debenham wrote (page 16 of transcript) to have the shipment arrive at Belgium toward the end of the month, for very probably there would be a sailing for Montreal *by the end of the month* or on *one of the first days of June,* and again the shipment should arrive not later than June 3d, because the ship was to sail on June 5th. In each instance a delay of several days was contemplated. Necessarily, and in the ordinary course of events, we think there must have been some delay between the arrival of the train bearing the shipments and its lading on board the ship. It surely was not contemplated that the shipment could or would be transferred from the train to the ship *instanter.* If the principle declared in the opinion be correct, plaintiff in error would be chargeable for the shipment from the very instant when the bill of lading

was delivered to Debenham even if the train bearing the shipment were at that very moment under way to the ship's side, where facilities for immediately embarking it were ready and awaiting its arrival.

The statement of facts sets forth that the receipt by Debenham of the shipment here involved was only a qualified one, for the special purposes shown (page 13 transcript), viz., *only to the extent that such shipments could be received by any one at Antwerp* in accordance with the provisions of the treaty. No attempt is made to show by the record, or in the agreed statement of facts, that the shipment was unnecessarily or unreasonably detained in Government custody at Antwerp, and surely there is no presumption against the carrier in this case. A good way to test the principle involved is to transpose conditions. Suppose that the train carrying the shipment had been delayed by some accident in transit, so as to arrive at Antwerp too late for lading on the steamer for which it was intended. Mr. Debenham, upon arrival of the goods at Antwerp, would have exchanged the same papers as in this case, and the goods would have been similarly warehoused. Could it then have been contended that this action on the part of Debenham constituted such a complete and absolute delivery of the shipment as would charge defendant as carrier.

We press this point, because we believe the record develops no fact or circumstance tending to

show that defendant is sought to be charged upon the theory that the embarkation of the shipment was not effected within a reasonable time after its arrival at Antwerp.

We believe that the contention seeking to charge the carrier in this action upon the theory that the storage of the shipment in the Government bonded warehouse was solely for the convenience of the carrier is an afterthought, a claim which was never intended to be of the gist of this action.

Defendant in error in its brief candidly states the controlling issue on this appeal as follows:

> "The whole case revolves upon the single question * * * whether the goods at the time of their destruction were in the possession of the defendant as a common carrier. Plaintiff asserts that they were so in the defendant's possession, and defendant asserts that they were not".
>
> Brief of Defendant in Error, p. 7.

And the statement of facts, after stating that Mr. Debenham could receive the goods only to the limited extent specified (page 13 of transcript), proceeds:

> "but it was his duty to *receive* and *forward* such shipments of merchandise as aforesaid *only to the extent* and *in the sense* and in the manner according to which shipments of merchandise coming into the Kingdom of Belgium for export * * * *might be received* by any one at Antwerp, to be thence forwarded under the treaty", etc.
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> Transcript of Record, p. 14.

We think the situation would have been different if the goods had been destroyed *in transit* while they were in cars which the carrier operated and physically controlled, or in warehouses representing agencies of the carrier, and some of the authorities cited by our opponents are in point as to such situations. But we think the whole situation and relationship of the parties was changed as soon as the shipment was impounded in the absolute exclusive, physical possession, custody and control of the Government. The carrier then had only the right to call for a delivery to him of the goods, but until such delivery had been made the carrier had not a single element of possession, custody or control. It is not a case where the deposit of the shipment was accessory to its carriage within the meaning of the precedents on this point, but a case in which the deposit was compulsorily made into governmental custody, according to an exceptional arrangement expressly arranged by the parties to avail themselves of the treaty benefits, such deposit being in fact and in principle for the *convenience of both parties.* The deposit was at a place where the property under the treaty and Belgian law could be impounded and was impounded in the custody of the law, to protect the lien of the Government for its duties if the shipment went no further, and to avoid payment of the duty if they were shipped out of the kingdom.

On principle the case seems to be without precedent and of novel aspect, presenting the new

question: who in contemplation of the law has the actual legal possession of goods actually physically deposited in the exclusive governmental possession, custody and control of a Government to protect its lien for duties?

We think this question is one of importance and general interest, and should be clearly decided, and therefore urge that this petition be granted.

Dated, San Francisco,
October 30, 1915.

Respectfully submitted,
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HENRY EICKHOFF,
EMIL POHLI,
Attorneys for Plaintiff in Error and Petitioner.

CERTIFICATE OF COUNSEL.

I hereby certify that I am of counsel for plaintiff in error and petitioner in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition is not interposed for delay.

EMIL POHLI,
Of Counsel for Plaintiff in Error and Petitioner.